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Nos. 81-31, 81-228 and 81-455

IN THE

Supreme Court of the United States

October Term, 1981

CALIFORNIA, et al., Appellants in No. 81-31
v.
GRACE BRETHREN CHURCH, et al.

UNITED STATES, et al., Appellants in No. 81-228
v.
GRACE BRETHREN CHURCH, et al.

GRACE BRETHREN CHURCH, et al., Cross-Appellants in No. 81-455
v.
UNITED STATES, et al.

On Appeals From the United States District Court for the Central District of California

MOTION FOR LEAVE TO FILE POST-ARGUMENT BRIEF AND POST-ARGUMENT BRIEF OF GRACE BRETHREN CHURCH, ET AL.

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION OF GRACE BRETHREN CHURCH, ET AL., TO FILE POST-ARGUMENT BRIEF

Pursuant to Rule 35.6 of the Rules of this Court, Grace Brethren Church, *et al.*, move for leave to file the attached brief. In support of this motion movants state as follows:

1. On Thursday, March 25, 1982, five days before the scheduled date of oral argument, movants received by ordinary mail Reply Brief of Appellants, State of California, *et al.*, which raised new arguments in the case, including argument based upon the recent decision of this Court in *United States v. Lee*, — U. S. —, 50 U. S. L. W. 4201 (February 23, 1982). The interval between Thursday and the following Tuesday for which oral argument was set provided movants with no adequate opportunity to respond to the aforesaid Reply Brief. Movants nonetheless believe it essential to proper disposition of this litigation that they be afforded an opportunity to address certain matters raised in the Reply Brief.

2. Upon oral argument, it became evident that inadequate information had been furnished the Court in the briefs of all the parties (including movants) on a dispositive aspect of the threshold issue of district court jurisdiction under 26 U. S. C. § 1341, the Tax Injunction Act. To assure that the Court will not arrive at a decision (and a resulting precedent) without the needed information in hand, it is essential that that information be summarily presented in a post-argument brief.

Wherefore, movants respectfully request that their motion for leave to file the attached post-argument brief be granted.

Respectfully submitted,

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POST-ARGUMENT BRIEF OF GRACE BRETHREN CHURCH, ET AL.

ARGUMENT

I. District Court Jurisdiction and the Tax Injunction Act: No Remedy *Whatever* Is Available (A) Because Declaratory Judgment Is Barred by State Law, (B) Because of Forbidden Administrative Entanglements Arising *Prior to* Appeal Into State Court.

1. *No Declaratory Judgment Allowed By State Law.* California law absolutely barred the movants from seeking declaratory judgment. California Unemployment Insurance Code, § 1851; Constitution of California, Article XIII, Section 32. And see *Pacific Gas & Electric Co. v. State Board of Equalization*, 27 Cal. 3rd 277, 165 Cal. Rptr. 122, 124 (1980). All that has been spelled out for the Court in the letter of movants' counsel to Francis Lorson, Esq., Chief Deputy Clerk dated March 31, 1982, and distributed to the Court April 1, 1982.

2. *No Possibility of State Court Relief Prior to Excessive Entanglement.* Here is what has not been clearly disclosed in any brief: *that entanglements of a plainly excessive sort are likely to occur in the benefit eligibility determination process and that that process can ensue from the inception of employment.*[1]

That crucial point is merely implied in movants' brief. But 58 pages of the Joint Appendix constitutes a graphic portrayal, by government expert witnesses, of state involvement in religious judgments and actions by comparison to which the government involvements warned against in *Lemon*,[2] *Serbian Orthodox*,[3] *Jones*[4] and *Catholic*

1. A new employee may seek benefits immediately, even if he or she had accrued the requisite qualifying number of quarters of employment under a previous employer.

2. *Lemon v. Kurtzman*, 403 U. S. 602 (1971).

3. *Serbian Orthodox Diocese v. Milivojevich*, 426 U. S. 696 (1976).

4. *Jones v. Wolf*, 443 U. S. 595 (1979).

Bishop of Chicago [5] are relatively innocuous. The benefit determination process *necessitates* state determinations of doctrine, reasonableness of doctrine, importance of doctrine, breach of doctrine and quality of religious zeal. The religious school has to face those possible entanglements [6] even though going up a ladder of administrative appeals in which the school is foreclosed from contending that the Act may not be constitutionally applied to it at all. (See California Constitution, Article III, Section 3.5).

Movants' main brief of course also shows that, apart from the benefit determination process, pervasive and enveloping administrative entanglements—which also chill Free Exercise rights—accompany the imposition of the statutory scheme throughout. How can this be described other than to constitute "sustained and detailed administrative relationships for enforcement of statutory or administrative standards" held forbidden in *Lemon*? Or the "confrontations and conflicts that follow in the train of those legal processes" [tax valuations, liens and foreclosures] criticized in *Walz*? [7] It can scarcely be said that this Court can now change its teaching on entanglement merely because no program of subsidy to religious schools is involved. First, the entanglement condemned

5. *NLRB v. Catholic Bishop of Chicago*, 440 U. S. 490 (1979).

6. Let it not be said that because those entanglements may, in part, be potential, they do not result in unconstitutionality. First, this court has held that the *potential* for entanglement is itself constitutionally offensive, *Lemon* having been decided on a motion to dismiss, with no record of actual entanglements having been produced. Second, however, instances of entanglement in the benefit determination process have *already* occurred to the very schools involved in this appeal. See the instance involving Redwood Christian Schools and the Oakland Office of Appeals over "regular" attendance at church. Brief for Grace Brethren Church, *et al.*, 16, fn. 8.

7. *Walz v. Tax Commission*, 397 U. S. 664, 674 (1970).

in *Lemon* was not bad because it was aid; the aid was bad because it was entangling. Second, that conclusion was clearly the heart of the Court's warning on entanglement in *Catholic Bishop of Chicago*, a case involving, not subsidy, but imposition of a federal regulatory scheme which had as yet involved *no* entanglement comparable to the above which arises in the benefit eligibility determination process.

Nor may an action for refund of taxes paid be entertained, prior to exhaustion of the administrative process, by the California courts. The California legislature has foreclosed any such action in § 1241 of the Unemployment Insurance Code. Thus, the bar of the first sentence of Article XIII, Section 32 of the Constitution of California is absolute as to the State's unemployment tax program, and not even the second sentence of that section—permitting the legislature to authorize refund actions in court—has been given effect with respect to unemployment taxes.

It is no answer to say, as do California and the United States, that constitutional harm can be avoided by religious schools which elect to participate in the unemployment tax program on the "reimbursement method", *i.e.*, paying into the fund only when a claim has been paid to one of its former employees. (1) Merely to elect participation is to acknowledge the licitness of the program. (2) The essence of the reimbursement method is the benefit eligibility determination process, already seen to be fraught with inquiries into faith and doctrine. (3) The State cannot even guarantee that unwarranted claims can be challenged in all instances, since Section 803(c) of the Unemployment Insurance Code denies reimbursement method employers the right to obtain relief from charges for benefits wrongfully paid, even in "misconduct" and "good cause" voluntary quit situations. See Unemployment Insurance Code Section 1030.

II. District Court Jurisdiction Did Not Depend Upon Whether the Religious Parties Would, of a Certainty, Ultimately Prevail on the Merits.

It was the judgment of the district court, closely familiar with local California law, and, having heard the government's expert testimony at first hand, that imposition of the challenged program on religious schools would give rise to forbidden excessive entanglements in the administrative proceedings *prior* to any opportunity for state court review. If the district court's judgment on the First Amendment merits was erroneous, this did not mean that the court had no jurisdiction. The propriety of assumption of jurisdiction by the district court should not depend upon whether, in the end, a violation of the Religion Clauses would be surely established but whether, at the beginning, a reasoned judgment, at trial court eye level, was made (a) that substantial Religion Clause issues existed, (b) that no state court declaratory judgment or injunction could yet be granted, (c) that the administration of the Act produced sustained and detailed administrative relationships between government and ministry, (d) that live potential was present from the start for the worst sorts of entanglement (involving state agents' judgments on doctrine, moral conduct and religious fervor), and (e) that, in state administrative proceedings, state agencies were forbidden, by California law, to pass upon constitutional issues.[8]

Certainly, too, the language chosen by the Congress in the Tax Injunction Act—"plain, speedy, and efficient remedy"—must not be stripped of all meaning. Judge Mariana Pfaelzer, relying on this Court's language in

8. "An administrative agency . . . has no power . . . (b) to declare a statute unconstitutional." Constitution of California, Article III, Section 3.5.

Tully v. Griffin, Inc., 429 U. S. 68, 76 (1976) (reiterated in *Rosewell v. LaSalle National Bank*, 450 U. S. 503, 517 (1981)), held state court relief here "at best uncertain". (J. S. App. 17a). But on the record it is plain that no remedy whatever existed. The odiousness of an eligibility determination process in the case of discharge of a teacher who had departed the faith or morals of the school would be but compounded through recycling in administrative appeal—while, upon appeal at last into state court, all that could be reviewed would be the result. The constitutional damage to the ministry would *already* have been suffered.

A similar situation was presented to this Court in *Barry v. Barchi*, 443 U. S. 55 (1979), wherein a statutorily-prescribed administrative procedure was challenged as unconstitutional. This Court refused to force the litigant (who was asserting a mere property right) to pursue the challenged procedure to its exhaustion prior to commencing an action in federal court. The Court stated:

> "Under existing authority, exhaustion of administrative remedies is not required when 'the question of the adequacy of the administrative remedy . . . [is] for all practical purposes identical with the merits of [the plaintiff's] lawsuit'." *Barry, id.* at 63, n. 10 citing *Gibson v. Berryhill*, 411 U. S. 564, 575 (1973).

This holding was joined by the entire Court (see separate opinion of Brennan, J., 443 U. S. at 68-69), and precisely describes the situation of Redwood Christian Schools herein. If forced to pursue the administrative process which it challenges as unconstitutional, this pervasively religious entity will have, *ipso facto*, suffered the harm to its religious liberties it had sought to prevent by bringing its complaint in federal court.

III. *United States v. Lee* Is Not in Point.

The governmental parties contend, in their Reply Briefs that *United States v. Lee*, — U. S. —, 50 U. S. L. W. 4201 (February 23, 1982) is here controlling. The attempt to lump together the two cases by the device of calling the school ministries "commercial" is contrary to the record (J. App. 94-98) and to fairness. If running a Christian school, through self-sacrifice and dedication and at no profit is "commercial", so is the activity of every nonprofit organization. *Lee* is distinguishable on at least two grounds: (a) the activity sought to be taxed, (b) the differences in governmental interest.

Sought to be taxed here is a prime religious activity, the religious formation of children—a ministry, an apostolate. Sought to be taxed in *Lee* was Mr. Lee's activity in hiring half a dozen men, to make himself a profit through the manufacture of unfinished lumber to be sold for commercial housing.

No such compelling state interest exists for the imposition of the Act upon the Redwood and San Diego Christian Schools as the Court found to exist for the imposition reviewed in *Lee*. The unemployment tax statute already contains so broad an exemption for religious ministries, that recognizing (on constitutional grounds) the non-church schools as excluded, would be without consequence to the national program. Secondly, all schools—the very schools here involved—were exempt until 1978. The govenmental parties have made no showing whatever that something occurred in 1978 giving rise to a suddenly *supreme* governmental interest in covering religious schools. The present case is plainly within the principle of *Sherbert v. Verner*, 374 U. S. 398 (1963).

IV. It Would Be Unconscionable to Force the Christian Schools Back to California Administrative and Court Proceedings for Eventual Review of the Merits of a Case Whose Merits Are Right Now Fully Before This Court for Disposition.

The religious plaintiffs in this case sued the United States with respect to a federally controlled program, challenging the imposition of that program on substantial, non-frivolous federal constitutional grounds. They were therefore properly in federal court unless the Tax Injunction Act barred district court jurisdiction.

The State of California, in response to the complaint filed by Grace Brethren Church, filed a cross-claim against the federal defendants, seeking declaratory relief against a federal requirement that the State impose unemployment tax coverage upon the religious schools. (J. A. 31). If California could not obtain such relief, it would suffer decertification of its entire state program, a heavy penalty indeed. There can be no doubt that the California cross-claim is in no way affected by the Tax Injunction Act, and therefore, the district court's jurisdiction to declare the federal requirement invalid could amply rest upon this cross-claim.

The various interpretations of the 1976 FUTA amendments made by the United States Secretary of Labor have occasioned a four-year nationwide spate of litigation for religious schools whose only desire is to be left alone by government, so that they may pursue their innocent and worthwhile task of providing religious education to youngsters. The constitutional case has now been litigated in its every aspect. But this has been at great expense to the small religious ministries here involved. Should they now be remitted to proceedings in California, they would face further *years* of proceedings there, commencing with administrative proceedings in which it would be futile to

raise any constitutional issue. When at last in state court, they would then be put to the repetition of the entire factual case which they have already once and well presented in a federal court. If it is true, *arguendo*, that the religious liberty for which they have contended is all of a piece with, and no more significant than, the property rights [9] of the operator of the commercial apartment building seen in *Rosewell*, nevertheless that conclusion, *which is a conclusion on the merits*, should not be used to force the religious schools to wait until perhaps 1984 or 1985 (if their resources can sustain the wait and their liberties the ensuing constitutional damage) for relief they had sought in a federal court in January, 1979. Such a bizarre enforced detour on the path to their liberties is precisely the kind of thing which is causing popular dismay toward the American legal system.

These religious schools have been set upon by the federal and state governments as a result of their obedience to religious principle, and for their reliance on constitutional guarantees of religious freedom and church-state separation. They do not seek to broaden federal court jurisdiction beyond its proper limits, nor do they seek to establish an exception to a salutary principle of federal judicial restraint. They have merely brought a federal constitutional case into a federal court where federal jurisdictional statutes expressly invite such actions, and where the Tax Injunction Act expressly permits the adjudication of such matters in the absence, as here, of a plain, speedy and

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9. Upon oral argument, counsel for Grace Brethren Church made the point that fundamental constitutional liberties have been accorded a greater degree of protection from government encroachment than mere property rights. See, *e.g.*, *U. S. v. Carolene Products Co.*, 304 U. S. 144, 152 n. 4 (1938); *Murdock v. Pennsylvania*, 319 U. S. 105, 115 (1943); *West Virginia Board of Education v. Barnette*, 319 U. S. 624, 639 (1943).

efficient remedy in the California courts. The schools do not even ask for an expansive construction of the existing exception to the Tax Injunction Act, for their California remedy is, in the oft-repeated phrase of this Court, "at best uncertain". But the schools' remedy for their claims as to the harms inherent in the administrative process is not merely "uncertain" under California law; it is non-existent.

Movants respectfully plead that this case now be decided on the merits. No principle of federalism would thereby be endangered. The most essential elements in the federal system—justice and due process—will *otherwise* be endangered.

Respectfully submitted,

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